

SUPERIOR COURT  
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CIVIL DIVISION  
Case No. 23-CV-00953

Capital Vision Services, LLC et al v. State of Vermont Department of Labor

Order on Motion to Stay and to Extend Filing Deadline

Plaintiffs challenge the Defendant's decisions to treat them as a single employer for State Unemployment Insurance. They ask for a stay of those decisions so as to preclude Defendant from enforcing them. Vt. R. Civ. P. 75(c). Plaintiffs also ask that the Court extend the deadlines for them to file this action based on alleged lack of clarity in the timing of the Defendant's decisions. Defendant opposes the motion. The Court makes the following determinations.

I. The Request for a Stay

The standard for issuing a stay is rigorous and similar to that employed for preliminary injunctive relief, which is an "extraordinary remedy." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 212 (2000). "To prevail on a motion to stay, the moving party must demonstrate: (1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) the stay will not substantially harm other parties; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995).

Here, the Court concludes that Plaintiffs cannot meet that high burden. At this preliminary stage, they have not established that they have a strong likelihood

of success on the merits for both procedural and substantive reasons. First, the Plaintiffs' complaint appears to concern matters and decisions that occurred well in the past. While they seek review under Vt. R. Civ. P. 75, that rule has a 30-day time period within which to appeal. No doubt, Plaintiffs have arguments as to why that deadline should be extended but, as it likely has already passed, they would need to establish "excusable neglect" to invoke the Court's jurisdiction. Vt. R. Civ. P. 6. Courts take a "hard line" on such matters, and excusable neglect is rarely found if the moving party had it within their power to take the action in a timely manner but did not do so. *In re Town of Killington*, 2003 VT 87A, ¶¶ 16–17, 176 Vt. 60, 67–68; *see also Clark v. Baker*, 2016 VT 42, ¶ 19, 201 Vt. 610, 620 ("[T]he threshold created by the excusable neglect standard 'remains high' and will be found 'only in rare cases.'" (citation omitted)). Here, the Court has serious concerns as to whether excusable neglect can be found. At a minimum, Plaintiffs have not made a showing that there is a "strong likelihood" that the complaint was brought in a timely fashion.

Second, Rule 75 allows limited judicial review of governmental administrative decisions, but only "if such review is otherwise available by law." The Vermont Supreme Court has interpreted this provision to mean that review is allowable if it "is provided by the particular statute establishing an agency," or falls under one of the common law writs, namely: *certiorari*, *mandamus*, or prohibition. *Rheume v. Pallito*, 2011 VT 72, ¶¶ 9–10, 190 Vt. 245, 250. Here, as there is no

statutory right to review, this Court has jurisdiction only if one of those writs is applicable.

Although Plaintiffs have not fully briefed the issue, it appears that the only writ potentially available to Plaintiffs in this context is the writ of mandamus. Mandamus is a remedy wherein the Court “require[s] a public officer to perform a simple and definite ministerial duty imposed by law.” *Sagar v. Warren Selectboard*, 170 Vt. 167, 171 (1999).

In this instance, and at this juncture, the Court agrees with Defendant that its determinations with regard to the issues before it fall within its legislative grant of authority and call for the exercise agency discretion. Plaintiffs have failed to establish a “strong likelihood” that it can obtain an order from the Court requiring the Defendant to perform a discrete ministerial duty.

Similarly, to establish irreparable harm, a party “must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation.” *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (internal quotations omitted). In this case, most of Plaintiffs’ concerns involve the collection and disbursement of money. They have not persuaded the Court that, were they to prevail, the Court could not address such financial issues through restorative and curative orders at the end of the case.

The Court believes the above two factors weigh decidedly against the issuance of a stay. The remaining factors are closer but also weigh against the stay.

Defendant is charged with administering aspects of Title 21. It argues forcefully that the assessments it makes help to fund the unemployment trust fund and that other employers may be required to contribute more if anticipated contributions fall short. Those potential downsides impact not only the Defendant's ability to administer its regulatory scheme but also third parties.

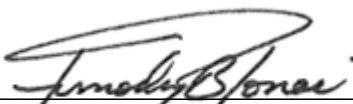
In sum, the Plaintiffs have not established that a stay is warranted.

## II. The Request to Enlarge Time

The Court perceives that the motion to extend time to file under Rule 75 is intricately intertwined with the Defendant's motion to dismiss and Plaintiffs' pending response to that motion. Accordingly, the Court defers ruling on that motion at this time. It will consider it along with the briefing accompanying the motion to dismiss.

WHEREFORE, the motion to stay is denied. The motion to extend the Rule 75 deadline is deferred.

Electronically signed on Tuesday, May 9, 2023, pursuant to V.R.E.F. 9(d).

  
Timothy B. Tomasi  
Superior Court Judge